Petition

81-1667

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No.....

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1981

CHARLES ANDERSON, Warden,

Petitioner,

v

MICHAEL E. CONNER,

Respondent.

CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

WHERE A HABEAS CORPUS PETITIONER HAS ALLEGED THE LACK OF COUNSEL AT A STATE COURT PROCEEDING AS A BASIS FOR RELIEF IN PRIOR PETITIONS AND HAS BEEN DENIED ON THE MERITS, DID THE DISTRICT COURT ABUSE ITS DISCRETION BY DISMISSING THE INSTANT PETITION UNDER THE PROVISIONS OF 28 USC fol. § 2254, RULE 9?

II.

WHERE A STATE COURT DEFENDANT VALIDLY WAIVES COUNSEL, PLEADS GUILTY TO AN OPEN CHARGE OF MURDER, AND THE STATE COURT IMMEDIATELY THEREAFTER AND AS A PART OF THE SAME PROCEEDING CONDUCTS A HEARING TO DETERMINE THE DEGREE OF THE OFFENSE, DOES THE CONSTITUTION REQUIRE A SECOND INDEPENDENT WAIVER OF THE RIGHT TO COUNSEL BY THE DEFENDANT?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

INDEX OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT

THE QUESTIONS WHETHER RESPONDENT'S CLAIM IS BARRED BECAUSE IT HAS BEEN ADJUDICATED IN PREVIOUS HABEAS CORPUS PROCEEDINGS AND WHETHER TWO SEPARATE WAIVERS OF COUNSEL ARE REQUIRED IN A SINGLE STATE COURT HEARING ARE IMPORTANT FEDERAL ISSUES REQUIRING DECISION BY THIS COURT 8

RELIEF SOUGHT 13

INDEX OF AUTHORITIES

Cases	Page
Carnley v Cochran, 369 US 506 (1962)	11
Moore v Michigan, 355 US 155 (1957)	10, 11
North Carolina v Butler, 441 US 369 (1979)	11
People v Conner, 383 Mich 786 (1970)	1
Statutes	
28 USC § 1254(1)	2
28 USC fol. § 2254	3, 5, 9, 10
MCLA 750.316; MSA 28.548	3
MCLA 750.317; MSA 28.549	4
MCLA 750.318; MSA 28.550	4
Constitution	
U.S. Const, Am VI	2

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CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Pursuant to Supreme Court Rule 19.5, Cross-Petitioner Charles E. Anderson, Warden respectfully requests that if this Court grants the pending petition for writ of certiorari filed by Michael Conner *(Michael E. Conner* v *Charles Anderson, Warden,* docket no. 81-6191) that this Court also grant the instant cross-petition in order to review the entire order of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The order of the United States Court of Appeals for the Sixth Circuit is attached hereto as appendix 1a. The opinion and order of the United States District Court for the Eastern District of Michigan denying a writ of habeas corpus is attached hereto as appendix 16a. The order without opinion of the Michigan Supreme Court denying Respondent's application for leave to appeal is reported at *People* v *Conner,* 383 Mich 786 (1970). The unreported order without opinion of

the Michigan Court of Appeals denying Mr. Conner's application for delayed appeal is reproduced as appendix D to Mr. Conner's petition, docket no. 81-6191. The judge's statement following the 1963 state court guilty plea, degree hearing, and sentencing is attached hereto as appendix 33a.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on November 30, 1981. Mr. Conner's petition for a writ of certiorari (docket no. 81-6191) was filed within 90 days of that date and was received by counsel for the Warden on February 8, 1982. This cross petition for writ of certiorari is filed under Supreme Court Rule 19.5 and is filed within 30 days of receipt of Mr. Conner's petition.

The jurisdiction of this Court is invoked under 28 USC §1254(1) and Supreme Court Rule 19.5.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const, Am VI (in pertinent part):

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

28 USC fol. § 2254, Rule 9:

"(a) Delayed petitions. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

"(b) Successive petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ."

MCLA 750.316; MSA 28.548 (as currently amended):[1]

"Murder which is perpetrated by means of poison, lying in wait, or other wilfull deliberate and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, criminal sexual conduct in the first or third degree, robbery, breaking and entering of a dwelling, larceny of any kind, extortion, or kidnapping, is murder of the first degree and shall be punished by imprisonment for life."

---

[1]

The offenses enumerated in the statute which can constitute felony murder have been expanded and revised somewhat since Respondent's trial in 1962. At the time of that trial, however, the statute did include, *inter alia*, robbery within its scope, which apparently formed the basis for the state trial court's conclusion that Respondent Conner was guilty of felony murder.

MCLA 750.317; MSA 28.549:

> "All other kinds of murder shall be murder of the second degree, and shall be punished by imprisonment in the state prison for life, or any term of years in the discretion of the court trying the same."

MCLA 750.318; MSA 28.550:

> "The jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, ascertain in their verdict, whether it be murder of the first or second degree; but, *if such person shall be convicted by confession, the court shall proceed by examination of witnesses to determine the degree of the crime, and shall render judgment accordingly.* All testimony taken at such examination shall be taken in open court and a typewritten transcript or copy thereof, certified by the court reporter taking the same, shall be placed in the file of the case in the office of the county clerk." (Emphasis added).

STATEMENT OF THE CASE

This is a habeas corpus proceeding in which Respondent Conner challenges his 1962 plea-based conviction of first degree murder in the Jackson County, Michigan circuit court. Mr. Conner was not represented by counsel. At a hearing in the trial court, he entered a plea of guilty to an open charge of murder and evidence was taken to determine the degree of the offense. Several witnesses testified and Respondent's confession was introduced into evidence, following which the trial court concluded that the murder had been perpetrated in the course of a robbery and thus, under Michigan statute, was murder in the first degree requiring a mandatory life

imprisonment sentence. In this habeas corpus proceeding, Respondent Conner alleges that his Sixth Amendment right to counsel was violated. Petitioner Warden (hereinafter sometimes referred to as the State of Michigan) submits that Respondent validly waived his right to counsel at the start of the hearing, and further submits that the question of Respondent's right to counsel has been adjudicated in previous habeas corpus petitions and consideration of that issue is, therefore barred under 28 USC fol. § 2254, Rule 9. The District Court agreed that Respondent had validly waived his counsel and that the successive petition should be dismissed because of prior determinations. The United States Court of Appeals for the Sixth Circuit reversed in part, concluding that although Respondent had validly waived his right to counsel for purposes of the guilty plea, he had not validly waived the right to counsel with respect to the degree hearing which took place at the same time as part of the same proceeding. The Court of Appeals ordered that Conner's judgment of conviction be amended to remove the conviction of first degree murder, thus resulting in a conviction of second degree murder.

Mr. Conner filed a petition for writ of certiorari (docket no. 81-6191) challenging the Court of Appeals' conclusion that he had validly waived his right to counsel with respect to the guilty plea proceeding, and the State has filed the instant cross-petition in order to ensure that the entire Court of Appeals order will be before this Court if Mr. Conner's petition is granted.

As indicated by Mr. Conner's confession admitted at the state court proceeding, he went to a gas station in Jackson, Michigan, with which he was familiar with the intention of robbing it. A storeroom which he knew to contain a cash box was locked and Conner forced the attendant, with whom he was previously acquainted, to open the storeroom at gunpoint. Conner robbed the station of at least $75 in cash. Before

making his escape, Conner forced the attendant to lie face down on the floor and then murdered him by shooting him twice in the head.

Following his arrest, Conner confessed to the crime and led police to the spot where he had hidden the murder weapon.

Conner was bound over for trial and an arraignment was scheduled for December 18, 1962, but at Conner's request the arraignment was advanced to December 13, 1962. At the arraignment Conner appeared without counsel. The transcript of the state court proceedings are reproduced in pertinent part in the appendix, 25a-32a. That transcript indicates that the information charging the offense of murder was read and Conner was informed of his constitutional rights. He indicated that he understood his rights and further indicated that he wished to plead guilty to the offense of murder. Pursuant to the statutory procedures, the court immediately proceeded—without any interruption whatsoever—to take proof as to the degree of the offense. Following the introduction of proofs, including Respondent's written confession, the court concluded that the murder had been committed in the perpetration of a robbery and thus under the statute was murder in the first degree punishable by the mandatory sentence of life imprisonment. Several years later, Conner made an application for delayed appeal which was denied by the Michigan Court of Appeals and Michigan Supreme Court.

In 1970 Conner filed a petition for habeas corpus in the United States District Court which rejected his contentions in a written opinion reproduced at Appendix 18a-20a. In that proceeding the court concluded that several issues had not been exhausted and rejected Respondent's claims that his confession had been coerced and that his constitutional right to an attorney had been violated. In Conner's brief he discussed the counsel issue in terms of whether he had waived his right

to counsel (see page 7 of Conner's District Court brief, reproduced at Appendix 23a-25a), and the District Court rejected his claim, Appendix 20a:

> "With respect to the counsel issue, petitioner [Conner] alleges that the police told him not to get an attorney and that the trial judge refused him counsel. The transcript shows that he was not denied counsel. • • • This allegation is found to be without merit.
>
> "In view of the foregoing the court finds that petitioner was not denied his constitutional rights and that the petition should be denied."

In a subsequent petition for habeas corpus filed in 1971, Conner reiterated several allegations relating to the character of his confession and the District Court denied the petition because that issue had been rejected on the merits in the earlier petition. See District Court opinion and order, Appendix 21a.

In the instant petition for writ of habeas corpus the only claim of constitutional error is Conner's allegation that the trial court did not obtain a valid waiver of counsel. The District Court rejected Respondent's allegations, finding a valid waiver and also concluding that the claim was precluded by virtue of the decisions in the earlier habeas corpus petitions. Appendix 17a. The Court of Appeals concluded that the record demonstrates that Conner waived his right to counsel with respect to the entry of the guilty plea and therefore did not determine whether the prior habeas corpus litigation barred Conner from asserting that claim. The Court of Appeals also concluded, however, that Conner did not validly waive counsel with respect to the taking of proofs to determine the de-

gree of the offense and further concluded that Conner cannot be held to have litigated this claim in his prior habeas corpus petitions.

REASONS FOR GRANTING THE WRIT

THE QUESTIONS WHETHER RESPONDENT'S CLAIM IS BARRED BECAUSE IT HAS BEEN ADJUDICATED IN PREVIOUS HABEAS CORPUS PROCEEDINGS AND WHETHER TWO SEPARATE WAIVERS OF COUNSEL ARE REQUIRED IN A SINGLE STATE COURT HEARING ARE IMPORTANT FEDERAL ISSUES REQUIRING DECISION BY THIS COURT.

It is manifest from the statutory provisions and the state court transcript itself (Appendix 25a-32a) that the colloquy between the trial judge and Mr. Conner in connection with the guilty plea and the subsequent taking of proofs for the purpose of determining the degree of the offense were part and parcel of a single, unified, continuous proceeding. The Court of Appeals artificially bifurcated this continuous proceeding and characterized it as two separate hearings, one involving the guilty plea and one involving an evidentiary hearing to determine the degree of the offense, and declared that two separate waivers of counsel must be demonstrated. The Court of Appeals result can be supported only by disregarding the fact that the issue of Conner's right to counsel had been adjudicated in earlier habeas corpus proceedings by distorting the factual record so as to give an erroneous impression of two separate hearings when in fact only one proceeding took place; and by manufacturing an unnecessary, impractical, and legally redundant requirement for multiple waivers of counsel. It must be further borne in mind that the Court of Appeals undertook this creation on its own initiative; at no time in the previous state or federal litigation had Respondent

himself specifically relied upon any such purported distinction between the plea-taking and the proof-taking aspects of the proceeding.

It is readily apparent that the Sixth Amendment right to counsel claim in this most recent habeas corpus proceeding does not allege new or different grounds for relief than were alleged in the 1970 habeas corpus proceeding which was determined on the merits against Mr. Conner's contentions. Conner's claim that he has not litigated the instant issue in the earlier proceeding is based upon the fact that in the 1970 opinion denying habeas corpus relief (Appendix 20a) District Judge Roth concluded that the state trial court had not "refused" or "denied" counsel to Conner, while in the instant proceeding, Conner now frames his argument in terms of "waiver." The subtlety and ingenuity of this semantic argument should not be permitted to obscure the fact that in the earlier habeas corpus proceeding Respondent did in fact challenge the lack of counsel at the state court proceeding. The ground for relief is Respondent's allegation that his Sixth Amendment right to counsel was violated, whether that violation be analyzed as a denial, a refusal or a waiver. As is readily apparent from the brief filed by Mr. Conner in the District Court in the 1970 proceeding, his whole argument relating to lack of counsel is couched in terms of waiver. Appendix 23a-25a.

Under the circumstances demonstrated by this record, it is apparent that the District court was eminently correct when it concluded that Respondent's claims regarding lack of counsel should be dismissed pursuant to 28 USC fol. § 2254, Rule 9. Not only had the petition been delayed for many years, but it is apparent that the current claim of lack of counsel "fails to allege new or different grounds for relief and the prior determination was on the merits . . . ." It also deserves mention that the Court of Appeals concluded that Conner's petitions "appear to be directed only to his pleading of guilty without

counsel and the decisions in the prior proceedings do not purport to deal with this particular issue [the alleged right to counsel at the proof-taking proceeding]." The State agrees that Conner never argued the distinction, found by the Court of Appeals, between the plea-taking and proof-taking, but that fact merely demonstrates that Conner had failed to exhaust adequate and available state remedies with respect to that issue and has failed to allege that issue as a basis for relief in the present proceeding. It is improper for the Court of Appeals to manufacture a factual distinction which had not been argued by Mr. Conner himself, to then grant relief based upon that purported distinction, and finally to reject application of 28 USC fol. § 2254, Rule 9 because of the failure by the State and earlier tribunals to specifically mention the issue.

Assuming that Respondent is entitled to assert the lack of counsel in the instant proceeding, the record clearly reflects adequate waiver of counsel.

It is undisputed that Conner was entitled to counsel at the state court proceeding. *Moore* v *Michigan*, 355 US 155 (1957). It is further undisputed that an uncounseled conviction cannot stand unless there has been a valid waiver of the right to counsel. It is the State's position that in the instant case there was a single proceeding and a single valid waiver which is all that is constitutionally required. The Court of Appeals was correct when it concluded that Conner had validly waived his right to counsel with respect to the plea-taking, but the State submits that the Court of Appeals misapprehended the facts and misapplied the proper legal principles when it concluded that the taking of proofs required a separate additional waiver of the right to counsel.

The Court of Appeals applied the correct legal principles in concluding that Conner had validly waived his right to counsel in connection with the taking of his guilty plea.

Moore v *Michigan, supra,* 355 US at 161-162, holds that a habeas corpus petitioner has the burden of showing by a preponderance of the evidence that he did not intelligently and understandingly waive his right to counsel. That holding was explained in *Carnley* v *Cochran,* 369 US 506, 516-517 (1962):

> "In *Moore,* the record showed clearly that the petitioner had expressly declined an offer of counsel by the trial judge, and we held that the accused had to show by a preponderance of the evidence that his acquiescence was not sufficiently understanding and intellegent to amount to an effective waiver. But no such burden can be imposed upon an accused unless the record—or a hearing, where required—reveals his affirmative acquiescence."

In the instant case the State submits that no hearing was or is required because the record reveals a valid waiver, particularly when it is recalled that "a court may find an intelligent and understanding rejection of counsel in situations where the defendant did not *expressly* state as much." *North Carolina* v *Butler,* 441 US 369, 373, fn 4 (1979). In *Butler* this Court said that an express written or oral statement of waiver of the right to counsel "is not inevitably either necessary or sufficient to establish waiver." *Butler, supra,* 441 US at 373. While mere silence is not enough to demonstrate waiver, "silence, coupled with an understanding of [a defendant's] rights and a course of conduct indicating waiver" may support the conclusion that a defendant has waived his rights. *Butler, supra,* 441 US at 373.

In the instant case the state court transcript indicates that the date of Conner's court appearance was advanced at his request, with the full knowledge that he was not represented by an attorney. Appendix 27a. The court carefully explained that Mr. Conner was entitled to an attorney of his own choice

and that if he was unable to furnish an attorney, that the state would furnish him with one. He stated that he understood his right. Appendix 28a. The court asked Conner what he wished to do and when there was no immediate response, the court rephrased the question and Conner responded that he wished to plead guilty of his own free will. Appendix 29a. On these facts the State submits that Conner had validly waived his right to counsel.

The State submits that the Court of Appeals erred, however, when it went on to conclude that there was an additional independent requirement for a second waiver of counsel when, two pages later in the transcript and as a part of the same continuous proceeding, the court indicated that it would take proof as to the degree of the offense. Appendix 31a. The record simply does not support the Court of Appeals' conclusion that there were two separate proceedings requiring two separate waivers. The effect of the Court of Appeals' decision is to engraft upon the Michigan statutory procedure an additional constitutional requirement not heretofore recognized by either the state or federal courts. The record reveals that Respondent had made a valid waiver of counsel no more than a few minutes previously. To require a second waiver of counsel before proceeding with proofs provides no substantive protection of Conner's constitutional rights which he had not already received moments earlier.

The practical consequence of the Court of Appeals' decision was to reduce Conner's conviction from first degree murder to second degree murder, with the result that he would become eligible for parole consideration, a fact of which the Court of Appeals was, no doubt, well aware. That fact cannot justify the Court of Appeals' result, however, since Conner is obviously guilty of a cold-blooded execution-style

murder in the course of a gas station robbery and the record reveals that his constitutional rights were fully protected in the state court.

RELIEF SOUGHT

For the foregoing reasons, if a writ of certiorari is granted in case no. 81-6191, a writ of certiorari should also issue with respect to this cross petition in order to review the entire order of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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Appendix

APPENDIX

TABLE OF CONTENTS

		Page
1.	Order of the United States Court of Appeals for the Sixth Circuit, November 30, 1981	1a
2.	Order of the United States District Court, October 31, 1979	16a
3.	Order of the District Court in prior habeas corpus proceeding, docket no. 35079, August 31, 1970	18a
4.	Order of the District Court in prior habeas corpus proceeding, docket no. 36732, July 28, 1971	21a
5.	Excerpt from Michael Conner brief (p. 7) filed in the District Court in docket no. 35079	23a
6.	Excerpt from transcript of state court proceeding, December 13, 1962	25a

FILED

NOV. 30 1981

JOHN P. HEHMAN, Clerk

NO. 80-1262

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL E. CONNER, Petitioner-Appellant v CHARLES E. ANDERSON, Warden, State Prison of Southern Michigan, Respondent-Appellee	

ORDER

Before: EDWARDS, Chief Circuit Judge; BROWN, Circuit Judge; and RICE, District Judge.*

Appellant, Michael E. Conner, was convicted, upon a guilty plea to a charge of open murder and after a bench hearing to determine the circumstances of the murder, of first degree murder in a Michigan circuit court in 1962. After unsuccessfully pursuing a delayed motion for a new trial in the circuit court and the Michigan appellate courts in 1965 and 1966, Conner filed, *pro se*, a habeas petition in the United States District Court for the Eastern District of Michigan. Judge Stephen J. Roth, in an opinion filed on August 31, 1970, concluded that, of Conner's various contentions, the only ones as

*The Honorable Walter H. Rice, United States District Judge for the Southern District of Ohio, sitting by designation.

to which he had exhausted his state remedies was the contention that his confession had been illegally obtained and that he had been denied benefit of counsel. Judge Roth then, based on the transcript of the arraignment, of the taking of the guilty plea, and of the evidence introduced on the issue whether Conner's plea of guilty to an open murder charge should be determined to be first degree murder, concluded (1) that the confession was not illegally obtained since this was pre-*Miranda* and the confession was freely and voluntarily given and (2) that Conner had not been denied counsel. Habeas relief was thereupon denied and there was no appeal. Conner filed another *pro se* habeas petition in the same federal district court, and Judge Roth determined, in an opinion and order of July 28, 1971, that the issues raised—i.e. as to his confession and denial of counsel—were finally determined in the prior habeas proceeding, that the ends of justice did not require reconsideration, and that the petition should be dismissed, citing, *inter alia*, 28 U.S.C. § 2244(b). There was no appeal from this decision.

In 1978, Conner, with counsel, filed a third habeas petition in the District Court for the Eastern District of Michigan, alleging that, at the time his guilty plea was taken, he did not waive his right to counsel. He further alleged that he had not litigated this contention in his prior habeas proceedings because his contention in the prior petitions was that he had been denied counsel, not that he had not waived counsel. Conner did not contend in this petition that his confession was illegally obtained. Upon reference to a magistrate for a report and recommendation, the magistrate concluded that Conner had not waived his right to counsel and that he had not litigated this particular contention in the prior habeas proceedings. The magistrate therefore recommended that the court enter an order requiring that Conner be discharged from custody unless he was allowed to plead anew to the murder charge.

Upon a review of the magistrate's report, the district court, Judge Patricia J. Boyle, disagreed with the magistrate's conclusion. The district judge concluded, in an opinion and order of October 31, 1979, that, on the authority of *North Carolina* v. *Butler*, 441 U.S. 369 (1979), and based on the transcript of the state court proceedings, Conner had effectively waived his right to counsel. The district court also determined, alternatively, that, for purposes of Rule 9, presumably Rule 9(b), Rules Governing § 2254 Proceedings, Conner's instant contention with respect to failure to obtain a waiver of counsel amounted to a third attempt to litigate his right to counsel claim.

Conner now appeals the dismissal of his third habeas petition, his contention being that he did not, upon his arraignment and plea of guilty, waive his right to counsel and that he did not, in his prior habeas proceedings, litigate this contention. Conner further contends that, in any event, even if he waived his right to counsel when pleading guilty to the indictment charging him with open murder or even if he is barred from contending that he did not so waive his right because he litigated such claim in the prior proceedings, he clearly did not waive his right to counsel and has not heretofore litigated such contention with respect to the hearing conducted to determine whether the open murder charge, to which he had pleaded guilty, would be determined to be first degree murder.

The respondent contends that the record demonstrates that Conner waived his right to counsel in all respects and that the district court should be affirmed on that ground. Respondent further contends, alternatively, that Conner has heretofore litigated his claim that he did not waive his right to counsel in all respects and that therefore the decision of the district

court should be affirmed on the basis of Rule 9(b) of the Rules Governing § 2254 Proceedings.[1]

Respondent agrees that at the time Conner pleaded guilty, he was entitled to counsel, *Moore v. Michigan*, 355 U.S. 155 (1957), which also places the burden on Conner to show that he did not waive his right to counsel. *Moore* at 161-162.

We conclude that the record demonstrates that Conner waived his right to counsel with respect to entry of the guilty plea and therefore we need not determine whether Conner is barred from asserting this contention here because of the prior habeas litigation and the finding below that he had made essentially the same contention in the prior litigation. Although the record reflects that Conner had less than a fourth grade education, he was twenty-five years old and had just been released from parole after a prior felony conviction in the same state court before the same judge. While Conner did

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[1]

Respondent still further contends, but only at argument, that if Conner is correct in his position that he has not already litigated his claim with respect to waiver because his prior claim was that he was denied counsel, not that he had waived counsel and because his prior claim was directed only to the plea of guilty to the open murder charge and not to the evidentiary hearing at which he was determined to be guilty of first degree murder, Conner has not exhausted his state remedies. More particularly, respondent contends that Conner's claims in the Michigan courts for post-conviction relief were the same as his claims that he has asserted in the first two federal habeas petitions, and therefore if he did not litigate his present claims in the prior habeas proceedings, he did not litigate them in the Michigan state courts. We do not consider this contention since respondent's brief assumes that Conner has exhausted state remedies and also the record of the post-conviction state proceedings was not included in the appendix. Moreover, the recommendation of the magistrate and the opinion of the district court below do not indicate that respondent contended there that there had been a failure to exhaust state remedies.

not expressly waive counsel, the transcript shows that the state trial judge advised Conner of his right to counsel of his own choice and that if he could not obtain counsel, the state would furnish such counsel. Conner stated that he understood this. The judge also advised Conner of his right to a jury trial, which Conner stated he understood. The judge then stated that Conner had heard the information read to him, which Conner acknowledged, and the judge asked how he wished to plead if he wished to plead, to which Conner responded "guilty." The judge then asked Conner if he wished to plead guilty, which Conner affirmed and also affirmed, in response to the judge's questions, that he pleaded guilty of his own free will with no threats or promises being made to him. Conner affirmed again that he understood that he could have a trial, including a jury trial, and that he wished to plead guilty of murder at that time. On this record, we agree that, applying the standard of *North Carolina v. Butler, supra*, as did the district court, the district court was correct in concluding that Conner effectively waived his right to counsel when he pleaded guilty to the charge of open murder.[2]

But Conner contends that, even so, since under Michigan law it was necessary to hold an evidentiary hearing for the judge to determine whether he was guilty of first degree murder and since such finding meant that he received a life sentence without possibility of parole, he was entitled to counsel to represent him at such hearing which he did not waive. The record shows that, at such hearing, the investigating officers testified under examination by the prosecutor and Conner's confession was read. Conner was given the opportunity but asked no questions.

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[2]

We are satisfied that the Court in *Butler*, although writing in the context of the requirements of *Miranda*, intended its reasoning to apply in the instant context. *Butler*, 441 U.S. at 373, note 4.

We believe that, in view of the significance to Conner of the proceeding to determine the degree of murder and in view of the fact that it would be an evidentiary hearing, Conner should have been advised that this would take place and of its importance to him and should have been offered the benefit of counsel, which the state trial judge did not do. This being so, we cannot conclude, applying the standard of *North Carolina v. Butler, supra,* that Conner implicitly knowingly and voluntarily waived his right to counsel for such evidentiary hearing. We also conclude that Conner cannot be held to have litigated this claim in his prior habeas petitions. His petitions appear to be directed only to his pleading of guilty without counsel, and the decisions in the prior proceedings do not purport to deal with this particular issue.

Accordingly, we conclude that judgment of the district court must be reversed and the cause remanded to the district court. The district court will enter an order requiring that Conner's judgment of conviction be amended to provide that he stands convicted of murder without a determination of murder in the first degree unless, within a reasonable time, the state conducts a hearing, with counsel afforded to Conner, for a determination of the question whether Conner should be held to have committed first degree murder

ENTERED BY ORDER
OF THE COURT

John P. Hehman /s/
John P. Hehman, Clerk

NO. 80-1262
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL E. CONNER Petitioner-Appellant v. CHARLES E. ANDERSON, WARDEN Respondent-Appellee	RICE, DISTRICT JUDGE, DISSENTING

I must respectfully dissent in part from the order issued by the majority of this panel. While I concur in the majority's determination that petitioner Michael Conner did not waive his right to counsel for the evidentiary degree hearing, I cannot agree with their conclusion that under *North Carolina v. Butler*, 441 U.S. 369 (1979), Conner waived his right to counsel when he entered a plea of guilty to the charge of open murder. My examination of the record has indicated that, at the very least, Conner is entitled to an evidentary hearing at which his claims relating to waiver may be fully explored. Because I have reached a result which differs in part from the majority's decision, I will briefly set forth below the factors underlying my conclusion.

The Court below denied Conner's petition for a writ of habeas corpus, by first finding that Conner had waived his right to counsel, and then concluding that in any event the petition constituted a successive petition which the Court need not consider under Rule 9, Rules Governing § 2254 Proceedings. Specifically, the Court below found that Conner's petition, which was characterized by the Court as relying upon an alleged violation of his right to counsel, represented a third successive attempt to seek relief on essentially the same ground. The majority herein, however, did not reach this

issue because of their decision that the District Court's waiver determination had been correct, at least insofar as it was premised upon waiver of counsel for Conner's guilty plea.

In determining that Conner had, under *North Carolina v. Butler*, 441 U.S. 369 (1979) (Butler), waived his right to counsel with respect to his plea of guilty to the charge of open murder, the majority herein relied upon the fact that Conner was advised of his rights to appointed counsel and to a jury trial; that he stated he understood; and that thereafter, he pleaded guilty, indicating that the plea was of his own free will (Majority Order, pp 5-6).[1] However, I do not believe that these facts satisfy the *Butler* analysis, which still mandates an inquiry into the circumstances surrounding an alleged waiver. In *Butler*, the Supreme Court stated that:

> An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver. *The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the Miranda case.* As was unequivocally said in *Miranda*, mere silence is not enough. That does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights. The courts must presume that a defendant did not waive his rights; the prosecution's burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated.

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[1] Like the majority, I agree that the Supreme Court intended *Butler* to apply to cases such as the present (Majority Order, p. 6, n. 1).

Id. at 373. (Emphasis added).

The majority order herein, insofar as it recites Conner's "course of conduct indicating waiver," *id.*, appears to conform with *Butler*. However, in my opinion, the majority's conclusion is premised only upon the form of Conner's alleged waiver, and does not address the issue of whether Conner *in fact*, knowingly, intelligently, and voluntarily waived his right to counsel. Despite its finding that waiver *may* be found in certain cases where, as herein, the record is devoid of an express waiver, the Supreme Court in *Butler* clearly stressed the importance of an inquiry into the circumstances surrounding the waiver. First, the Court stated that "[w]e do not today even remotely question the holding in *Carnley v. Gibson*, 369 US. 506, which was specifically approved in the *Miranda* opinion." 441 U.S. at 373, n.4. The language referred to in *Miranda v. Arizona*, 384 U.S. 436 (1966), is as follows:

> Presuming waiver from a silent record is impermissible. The record must show, *or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer.* Anything less is not waiver.

Id. at 475, quoting from *Carnley v. Gibson*, 369 U.S. 506, 516 (1962) (emphasis added). Second, the Supreme Court in *Butler* stated that:

> Even when the right so fundamental as that to counsel at trial is involved, the question of waiver must be determined on "the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."

441 U.S. at 374-375, quoting from *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (*Zerbst*).

I believe that the above language in *Butler* and the other cited Supreme Court cases requires more than a repetition of the bare facts of a defendant's comments of record, particularly when his waiver claim is premised upon facts and circumstances not adequately explained by that record. I am unable to understand how a determination of the intelligence and voluntariness of a waiver can be made without some inquiry into the circumstances surrounding the challenged act. Therefore, because the majority order fails to address these matters, I believe it does not comply with the standards established by the Supreme Court.

I am unwilling to conclude on the basis of the record herein, which I deem to be an inadequate exposition of the factual matters involved, that Conner's waiver was intelligently and voluntarily made, under the criteria outlined in the *Zerbst* decision, and recently followed in *Butler*.[2] In *Zerbst*, the Supreme Court stated with respect to waiver, that:

> It has been pointed out that "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights and that we "do not presume acquiescence in the loss of fundamental rights." A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

---

[2]

Like the majority, I have no difficulty in concluding that failure to exhaust the waiver question at the state level is not at issue herein, given the fact that Respondent-Appellee's brief assumes exhaustion of this matter.

304 U.S. at 464 (citations omitted). Applying that standard herein, I conclude that under the circumstances of this case there are, at the very least, issues of fact concerning whether Conner's alleged waiver of counsel for his guilty plea to the charge of open murder was intelligently made, and constituted an intentional relinquishment of a known right. I am particularly moved to this conclusion in view of Conner's lack of education, his previous conviction without assistance of counsel, and his conduct during the time in question.

Conner's affidavit, filed with his habeas petition below, presents factual issues with regard to the entire chain of events leading to his guilty plea and the subsequent degree hearing. At the time of his murder conviction, Conner was a twenty-five year old male with a less than fourth grade education, and one prior conviction, as a result of a guilty plea, on a charge of breaking and entering. On that occasion, Conner had appeared without counsel before the same judge who was ultimately to receive his murder plea, and had been sentenced to eighteen months to fifteen years in prison (Joint Appendix 9-a; 80-a; 108-a). Conner's affidavit states that: 1) he was misled by police, who assured him that if he cooperated, he would be taken care of; 2) he was promised a job teaching boxing upon his release from prison; 3) he suffered a blackout while in custody, and required medical attention; 4) he did not understand the nature of the proceedings to which he was subjected, or the purpose of the degree hearing; and 5) he did not understand the value an attorney would be to him at his arraignment or hearing. (Joint Appendix 108-a; 109-a). These allegations are supported by Conner's prior experience in the criminal system, which was not extensive, and had been without the benefit of counsel, as well as by the fact that the trial judge never explained to Conner the effect of pleading guilty, the purpose of the degree hearing, or the possible sentence which might be imposed.

In addition, other evidence of record indicates that the authorities were aware of Conner's previous participation in the Golden Gloves Boxing Competition, and that a childhood schoolmate was involved in the events preceding Conner's guilty plea.[3] (Joint Appendix 7-a; 46-a; 47-a; 108-a). In fact, there is a strong inference in the record that the schoolmate's name was invoked by the authorities in order to gain Conner's trust (Joint Appendix 46-a).

Given these facts, which support Conner's claim that he did not knowingly, voluntarily, or intelligently waive his right to counsel, I cannot agree with the majority herein, or the district judge below, that Conner waived his right to counsel. I am simply not willing to make the quantum leap which would be required herein, from a record which shows only that Conner was advised of a right to counsel, and which is devoid of any other fact or circumstance motivating his decision to waive counsel, to the conclusion reached by the majority that Conner's waiver, if indeed that is what it may have been, was intelligently and understandingly made. I am particularly reluctant to assume waiver on the basis of a record which has never been subjected to an evidentiary hearing at any level. Accordingly, I would remand this cause to the District Court with instructions that an evidentiary hearing be held, at which the facts and circumstances surrounding Conner's alleged waiver of counsel would be fully presented.

---

[3]

Significantly, the record indicates that the former school "chum," Jim Fleming, may in fact have been the prosecuting attorney who signed the information against Conner, and examined him at the arraignment on the open murder charge (Joint Appendix 4-a–7-a). Absent the unlikely possibility that two persons named James Fleming were involved in this case, I would conclude that Conner's childhood friend, and the Jackson County prosecuting attorney were one and the same.

Because my conclusion on the waiver question would require consideration of the successive petition issue deferred by the majority, I will briefly discuss those matters pertinent to the dismissal of Conner's petition under Rule 9, Rules Governing § 2254 Proceedings. In my opinion, the petition presented to the District Court was not a successive petition, and even if it could be viewed as such, I would find that the lower Court abused the discretion granted by Rule 9 by refusing to redetermine the matters raised therein.

Rule 9(b) provides that "[a] second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits." An examination of the record indicates that the issue previously presented to, and considered by, Judge Roth was whether the trial court had *denied* counsel to Petitioner. (Joint Appendix 95-a; 97-a). According to Judge Roth's opinion, rendered in the first habeas case on August 31, 1970, the allegation presented by Conner's petition was merely that "the police told him not to get an attorney and that the Court denied him the right to an attorney." *Id.* Based only on the transcript of the arraignment and the degree hearing, the judge concluded that the transcript did not show that Conner had been *denied* counsel. *Id.* at 96-a; 97-a. Based on the record presented, I too, would have little difficulty determining that the trial court did not *refuse or deny* counsel to Conner, as the transcript contains no inference that counsel was requested *or* refused. In fact, the excerpt cited by Judge Roth indicates otherwise, as the trial judge specifically informed Conner that he was entitled to have an attorney appointed if necessary. *Id.*

However, it seems to me that the issue of *waiver* of counsel (the matter at issue herein) raises different questions than those which arise in connection with a *refusal or denial* of counsel. While both relate to the broad area of the Sixth

Amendment right to counsel, each presents a different ground, or "sufficient legal basis for granting the relief sought." *Sanders v. United States*, 373 U.S. 1, 16 (1963) (Sanders). For example, it is entirely conceivable that counsel would be *offered* with the utmost deference to constitutional requirements, but be *waived* by a defendant who was incapable of acting intelligently because he was insane. In such a circumstance, the right to relief could in no sense be said to depend upon whether the petitioner had been *refused or denied* counsel, but would rather rest entirely upon whether his *waiver* had been intelligently made. *Zerbst*, 304 U.S. 458, 464 (1938). Thus, although *waiver* and *denial* of counsel obviously involve the same general concept, i.e., the right to counsel guaranteed by the Sixth Amendment, they provide distinct bases of relief. Therefore, I would conclude that the petition below, raising the issue of waiver as opposed to denial of counsel, did not constitute a successive petition, particularly in light of the Supreme Court's admonition in *Sanders* that "[s]hould doubts arise in particular cases as to whether two grounds are different or the same, they should be resolved in favor of the applicant." 373 U.S. at 16.

Moreover, even assuming that Conner's pleading below represented a successive petition, I am of the opinion that the district judge erred in failing to consider whether Conner had demonstrated that "the ends of justice would be served by permitting the redetermination of the [previously asserted] ground." *Id.* While the judge below may have concluded that Conner had not made such a showing, her decision does not indicate that attention was directed toward this inquiry, as is mandated by *Sanders*. In this context, among the factors which indicate that redetermination would be appropriate are: 1) the fact that Conner, a person of less than fourth grade education, has never been represented prior to the present habeas action, at any trial or appellate proceeding by an attorney; and 2) the fact that an evidentiary hearing has never

been held with respect to any claim raised by Conner, even though some of those claims involved factual issues, such as alleged police misrepresentations, which could not have been resolved by resort to the "trial" transcript. Because the habeas petition and affidavits filed below clearly raise these issues (Joint Appendix 102-a—106-a), I would hold that the District Judge erred by failing to consider, and negate if necessary, Conner's showing that redetermination of the issues in his petition would serve the ends of justice.

For the foregoing reasons, I dissent from the portion of the majority's order whch concludes that Conner waived his right to counsel with respect to his plea of guilty to the charge of open murder. I would therefore remand that issue to the District Court with instructions that an evidentiary hearing be conducted into the facts and circumstances surrounding Conner's alleged waiver of counsel.

I have no difficulty, however, in joining that part of the majority's order which finds that Conner did not waive his right to counsel with respect to the evidentiary degree hearing held subsequent to his guilty plea. In this request, I concur with the reasoning set forth so ably in the Majority Order.

RECEIVED—NOV. 2, 1979

PATRICIA J. BOYLE
United States District Judge

COPY FILED
OCT 31, 8:15 PM '79

CLERK
U.S. DISTRICT COURT
EAST. DIST. MICH.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL E. CONNER, Petitioner, -vs- CHARLES E. ANDERSON, Respondent.	Civil Action No. 78-71182

OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

Petitioner has filed for a third time in this Court a Petition for a Writ of Habeas Corpus seeking to overturn his conviction for first degree murder entered by a Judge of the Jackson Circuit Court in 1962 after his guilty plea to an open charge of murder was accepted and a hearing was held pursuant to appropriate state court procedure to determine the degree of his guilt. Petitioner, who was not represented by counsel at the time of his plea, or of his hearing, or throughout his attempts to seek review by the state courts of his conviction,

has twice before unsuccessfully urged this Court to conclude that he was denied counsel. On each occasion the late United States District Judge Stephen J. Roth denied his petition. On this, his third attempt, and now represented by appointed counsel, he urges the Court to overturn his conviction on the ground that he did not waive counsel in accordance with federal constitutional standards. A Magistrate's Report and Recommendation agreeing with Petitioner's position has now been filed, and objections to the Report have been filed by the Attorney General, as provided for by 28 U.S.C. 636(b)(1)(B) and (C).

Upon *de novo* consideration of the issues involved, the Court concludes that the record of Petitioner's plea and hearing satisfactorily establishes that Petitioner waived counsel in fact in accordance with the waiver standard prescribed by *North Carolina v. Butler,* .... U.S. .... (decided April 24, 1979, 47 U.S.L.W. 4454) and the cases therein cited and discussed. Accordingly, the Court declined to accept the Report and Recommendation of the Magistrate. In addition, the Court concludes that the present petition is a third successive attempt to seek relief upon essentially the same ground, *i.e.*, an asserted constitutional violation of Petitioner's right to counsel. For that reason also, the instant Petition should be denied. Rule 9, Rules Governing Section 2254 Proceedings.

It is therefore ORDERED, ADJUDGED and DECREED that the Petition for a writ of habeas corpus be and the same hereby is DENIED.

Dated: OCT 31 1979
Detroit, Michigan

Patricia J. Boyle /s/
PATRICIA J. BOYLE
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

A TRUE COPY
FREDERICK W. JOHNSON, Clerk
BY BEVERLY J. GERULSKI
Deputy Clerk

MICHAEL E. CONNER, Petitioner v. PEOPLE OF THE STATE OF MICHIGAN, Respondent	CIVIL ACTION NO. 35079

RULING ON PETITION FOR WRIT OF HABEAS CORPUS

The court has before it a petition for a writ of habeas corpus filed in pro per and forma pauperis by Michael E. Conner, an inmate of the State Prison of Southern Michigan, Jackson, Michigan. Petitioner pleaded guilty in the Jackson County Circuit Court to a charge of murder and was sentenced to life imprisonment on December 13, 1962. He makes the following allegations: (1) that the police forced a confession from him; (2) that the police told him not to get an attorney and that the court denied him the right to an attorney; (3) that there was no warrant at the time of his arrest and the complaint was defective; (4) that his rights under the *Miranda* decision were violated; (5) that his plea was coerced; and (6)

that it was error for the entire court proceeding to take only forty minutes. The respondent filed a motion to dismiss.

In support of the motion to dismiss the respondent has submitted the pleadings which petitioner presented to the Michigan Supreme Court. These pleadings reveal that the only questions which petitioner is now raising that have been presented to the Michigan Supreme Court are the questions concerning the confession and the attorney.

The law requires that the available state remedies be exhausted as to each question presented in a habeas corpus petition prior to a federal court deciding the question on the merits. 28 U.S.C. § 2254. Petitioner has only exhausted the available state remedies on the questions about counsel and the confession, and thus only these two questions can be considered at this time.

The respondent has submitted the transcript of the arraignment and the transcript of the hearing held after petitioner had entered his plea to determine the degree of murder. Just prior to petitioner making the alleged coerced confession, he indicated that the statement he was about to make was being made freely and voluntarily. At the close of the statement he indicated that he had been speaking freely and voluntarily, that he had not been forced to make the statement, that the police had been good to him, and that he had not been mistreated.

[illegible] the record does not support petitioner's allegation of coerced confession and the court finds it to be without merit. (The court notes that the standards set forth in *Miranda*

v. Arizona, 384 U.S. 436 (1966) are not to be applied retroactively. *Johnson v. New Jersey*, 384 U.S. 719 (1966).)

With respect to the counsel issue, petitioner alleges that the police told him not to get an attorney and that the trial judge refused him counsel. The transcript shows that he was not denied counsel.

The Court: You understand, Mr. Conner, that you are entitled to an attorney of your own choice and if you are unable to furnish one that the state will furnish you one.

The Defendant: Yes.

This allegation is found to be without merit.

In view of the foregoing the court finds that petitioner was not denied his constitutional rights and that the petition should be denied.

Stephen J. Roth /s/
STEPHEN J. ROTH
United States District Judge

DATED: August 31, 1970.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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BY BEVERLY J. GERULSKI
Deputy Clerk

MICHAEL E. CONNER, Petitioner v. PEOPLE OF THE STATE OF MICHIGAN, Respondent	CIVIL ACTION NO: 36732

OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

The Court has before it a petition for a writ of habeas corpus filed in pro per and forma pauperis by Michael E. Conner, an inmate at the State Prison of Southern Michigan. He was convicted in the Jackson County Circuit Court of first degree murder upon his plea of guilty and was sentenced on December 13, 1962 to a term of life imprisonment.

In presenting his claim for relief the petitioner has made substantially the same claims and has requested relief similar to that which he requested in a former application for writ of habeas corpus. The Michigan Attorney General has answered the petition by filing a motion to dismiss.

In considering the prior petition this Court dealt with the merits of the petitioner's contentions that his confession was coerced and that he was denied counsel. The instant petition,

in a rambling fashion, enumerates seven allegations as a basis for relief, all of which relate to the character of the confession.

In federal habeas corpus a court need not entertain a second petition where the same grounds are presented, where the prior determination was on the merits, and where the ends will not be served by another review. *Hanovich v. Maxwell*, 342 F.2d 161 (C.A. 6, 1965), *cert. denied*, 382 U.S. 868. The statutory authority for this holding was derived from Title 18, United States Code, Section 2244(b), which provides:

> "When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ."

Having previously determined the question of the petitioner's confession, and nothing having been shown indicating that the ends of justice require a second determination of this

issue, the respondent's motion is GRANTED, and the petition for writ of habeas corpus is DENIED.

Date: July 28, 1971,

Stephen J. Roth /s/
Stephen J. Roth
United States District Judge

POWELL VS. ALABAMA, 287 U.S. 68-69

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and some times no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad.

He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon encopetent evidence, or evidence irrelivant to the issue or otherwise inadmissable. He lacks both the skill and knowledge adaquately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he does not know to establish his innocence.

ADAMS VS. UNITED STATES, EX REL McCANN, 317 U.S. 269

The question in each case is whether the accused was competent to exercise an intelligent, informed judgement and for determination of this question it is of course relevant whether he had the advice of counsel."

JOHNSON VS. ZERBST, at 464;

The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

AT 465;

The Constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused whose life or liberty is at stake is without counsel. This protecting duty impose the serious and weighty responsibility and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropricate for that determination to appear upon the record.

AT 468;

If the accused however, is not represented by counsel and has not competently and intelligently waived his Constitutional right, the 6th Amendment stands as a judisdictional bar to a valid conviction and sentence depriving him of his life or liberty. A Courts jurisdiction at the begining of trial may be lost "in the course of the proceedings" due to failure to complete the court as the 6th Amendment requires by providing counsel for an accused who is unable to obtain counsel, who has not intelligently waived this Constitutional guaranteed, and whose life or liberty is at stake."

AMENDMENT 6 RIGHTS OF ACCUSED:

The right may be waived by a defendant whose education qualifies him to make an intelligent choice (93) A sentence imposed upon a plea of guilty is invalid if such plea was entered through deception or coersion of the prosecuting at-

torney, or in reliance upon erronious advice given by any police officers in the employ of that government, where the defendant did not have the assistance of counsel and had not understandingly waived the right to such assistance. (96).

(95) ADAMS VS. U.S. EX REL McCANN, 317 U.S. 269.

(97) WALKER VS. JOHNSON, 312 U.S. 275.

VAN MOLTKE VS. GILLIES, 332 U.S. 708.

MEMPHA VS. RHAY, 19 L. Ed. 2, 336.

The right to counsel even at sentencing is an Constitutional Right.

(4-a) Jackson, Michigan
Thursday, December 13, 1962
9:07 o'clock A. M.

— — —

THE COURT: All right.

MR. FLEMING: Michael E. Conner, would you step up here to this table, please?

THE DEFENDANT: Yes, sir.

(The defendant, Michael E. Conner, then stepped before the Court.)

MR. FLEMING: Your name is Michael E. Conner?

THE DEFENDANT: Yes.

MR. FLEMING: Where were you born, Mr. Conner?

THE DEFENDANT: Jackson, Michigan.

MR. FLEMING: Jackson, Michigan?

THE DEFENDANT: Yes, sir.

MR. FLEMING: And what is the date of your birth?

THE DEFENDANT: November 28, 1937.

MR. FLEMING: November 28th of 1937?

THE DEFENDANT: Yes, sir.

MR. FLEMING: And that makes you how old a man now?

(5-a) THE DEFENDANT: 25.

MR. FLEMING: 25?

THE DEFENDANT: Yes.

MR. FLEMING: And what has been your last address, Michael?

THE DEFENDANT: 5675 Parkdale, Detroit, Michigan.

MR. FLEMING: 5675 what street?

THE DEFENDANT: Detroit, Michigan.

MR. FLEMING: 5675 what street?

THE DEFENDANT: Parkdale.

MR. FLEMING: Parkdale?

THE DEFENDANT: Yes, sir.

MR. FLEMING: Detroit, Michigan?

THE DEFENDANT: Yes, sir.

MR. FLEMING: Who did you live there with?

THE DEFENDANT: My landlord, Dorothy Chandler.

MR. FLEMING: Now, Mr. Conner, you understand that you were bound over for arraignment on the 18th day of December of this year?

THE DEFENDANT: Yes.

MR. FLEMING: Is that correct?

THE DEFENDANT: Yes.

MR. FLEMING: And I understand that you requested (6-a) to be brought up sooner than that date, is that correct?

THE DEFENDANT: Yes, sir.

MR. FLEMING: And you are not represented by an attorney.

Is that correct?

THE DEFENDANT: Yes.

MR. FLEMING: (Addressing the Court): Shall I read the information, your Honor?

THE COURT: Yes.

MR. FLEMING: (Reading):

"STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF JACKSON Of the September Term in the year A. D. 1962

COUNTY OF JACKSON, ss.

James G. Fleming, Prosecuting Attorney in and for the County of Jackson aforesaid, for and in behalf of the People of the State of Michigan, comes into said Court, in the September Term thereof, in the year A. D. 1962, and gives the Court here to understand and be informed that Michael E. Conner, late of the City of Jackson, in the County of Jackson and State of Michigan, heretofore, to wit: On the (7-a)4th day of December A. D. 1962 at the City of Jackson in the County of Jackson aforesaid feloniously, wilfully and of his malice aforethought, did kill and murder one Richard Winters, contrary to the form of the Statute in such case made and provided and against the peace and dignity of the People of the State of Michigan.

(signed) James G. Fleming
Prosecuting Attorney."

THE COURT: You understand, Mr. Conner, that you are entitled to an attorney of your own choice and if you are unable to furnish one that the State will furnish you one?

THE DEFENDANT: Yes.

THE COURT: You understand that?

THE DEFENDANT: Yes.

THE COURT: And also that you are entitled to a jury trial if you desire?

THE DEFENDANT: Yes.

THE COURT: You understand that?

THE DEFENDANT: Yes.

(8-a) THE COURT: And you have heard the information read to you?

THE DEFENDANT: Yes.

THE COURT: What do you wish to do?

(There was no response by the defendant, Michael E. Conner.)

THE COURT: (Continuing): How do you wish to plead if you want to plead?

THE DEFENDANT: Guilty.

THE COURT: You wish to plead guilty?

THE DEFENDANT: Yes.

THE COURT: You are pleading guilty of your own free will, are you?

THE DEFENDANT: Yes.

THE COURT: No threats or promises being made to you?

THE DEFENDANT: No.

THE COURT: You understand that you can have a trial?

THE DEFENDANT: Yes.

THE COURT: You understand that you can have a jury trial if you wish to?

(9-a) THE DEFENDANT: Yes.

THE COURT: You understand that?

THE DEFENDANT: Yes.

THE COURT: But you wish to plead guilty this morning to the offense of murder?

THE DEFENDANT: Yes.

THE COURT: Is that right?

THE DEFENDANT: Yes.

THE COURT: You are on probation now, aren't you?

THE DEFENDANT: No.

THE COURT: Or parole.

THE DEFENDANT: No.

THE COURT: When was your parole up.

THE DEFENDANT: 20th of October.

THE COURT: 20th of October?

THE DEFENDANT: Yes.

THE COURT: Last October?

THE DEFENDANT: Yes.

THE COURT: Did I send you to prison before?

THE DEFENDANT: Yes.

THE COURT: What was that for? Breaking and entering?

THE DEFENDANT: Yes.

(10-a) THE COURT: How much time did you get?

THE DEFENDANT: One and one-half to fifteen.

THE COURT: And you got out on parole?

THE DEFENDANT: Yes.

THE COURT: (Continuing): And served your parole, is that it?

THE DEFENDANT: Yes.

THE COURT: All right.

You sit down and we will take some proof as to the degree of this offense.

Sit right there by the table.

MR. FLEMING: Have a seat right here, Mr. Conner.

THE DEFENDANT: Yes.

MR. FLEMING: (Addressing the Court): Your Honor Mr. Hall from our office will handle the proofs on that.

THE COURT: All right.

MR. HALL: Your Honor: I should like to call for my first witness at this time Robert Wessel.

THE COURT: All right.

MR. HALL: Will you please step up here and be sworn?

MR. WESSEL: Yes, sir.

THE CLERK: Step right over here, Mr. Wessel.

(84-a) STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF JACKSON

THE PEOPLE OF THE STATE OF MICHIGAN vs. MICHAEL E. CONNER, Defendant	Number: AH-460

JUDGE'S STATEMENT

The above-named defendant was charged with the offense of murder. The Court took considerable testimony to determine the degree, and after listening to several witnesses, the Court determined that it was murder in the first degree.

This defendant, who is 25 years of age, went to the Tulsa filling station on South Milwaukee Street near the end of Wesley and Otsego Streets and there proceeded to hold up Richard Winters, the attendant at the station.

He made Mr. Winters go in the back room where Winters gave him what money he had on him, and then he made him open a small box where the surplus money was, (85-a) and took that also. He then made Mr. Winters lie on the floor and proceeded to shoot him twice with a .38 caliber revolver.

Mr. Winters was later discovered in the filling station and the police were called, and a search began for the person that did it, and this defendant was later apprehended in Detroit, where the revolver was found, and he admitted his guilt and was returned to Jackson.

He made a complete and full statement of the offense to the assistant prosecutor, which statement has been transcribed, and was offered in evidence and admitted.

He also related how he had committed the crime to Officer Warner of the Jackson Police Department, and the story was all transcribed and placed upon the record of the Court.

This man has been in prison before for breaking and entering in the nighttime, and apparently just got off parole.

I refer you to the records of the Prison for his criminal history.

The Court determined it was murder in the first (86-a) degree because it was committed while the defendant was robbing the filling station.

I sentenced him to the State Prison of Southern Michigan for life.

(signed) John Simpson.
Circuit Judge.

Date: December 13, 1962.

— — —

Opposition

No. 81-1667

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

CHARLES E. ANDERSON, Warden,
State Prison of Southern Michigan
at Jackson, Michigan,

Petitioner,

v

MICHAEL E. CONNER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I.

WHERE THE ISSUE OF WHETHER THE STATE TRIAL COURT OBTAINED AN INTELLIGENT AND UNDERSTANDING WAIVER OF THE RIGHT TO COUNSEL WAS NOT PREVIOUSLY DETERMINED BY THE DISTRICT COURT ON THE MERITS, WHERE THAT GROUND WAS NOT DELIBERATELY WITHHELD FROM PRIOR PETITIONS, AND WHERE THE PRESENT PETITION WAS NOT AN ABUSE OF THE WRIT, WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION BY DISMISSING THE PETITION UNDER THE PROVISIONS OF 28 U.S.C. fol.§2254, RULE 9?

II.

WHERE RESPONDENT STOOD CHARGED WITH OPEN MURDER UNDER MICHIGAN LAW, THEREFORE FACING A HEARING TO DETERMINE THE DEGREE OF THE CHARGE, AND THUS, THE POSSIBLE PENALTY, AND WHERE THE TRIAL COURT FAILED TO ASK RESPONDENT IF HE UNDERSTOOD THE FACT THAT A HEARING WOULD BE HELD TO DETERMINE THE DEGREE OF HIS GUILT AND IF HE UNDERSTOOD THE VALUE OF COUNSEL AT THE HEARING, WHETHER THE TRIAL COURT FAILED TO OBTAIN A KNOWING AND INTELLIGENT WAIVER OF COUNSEL FROM RESPONDENT?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
INDEX OF AUTHORITIES	iii
OPINIONS BELOW	iv
JURISDICTION	v
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	v
COUNTERSTATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	6
CONCLUSION	13

INDEX OF AUTHORITIES

pages

Cases

Faretta v. California, 422 U.S. 806 (1975) 12

Johnson v. Zerbst, 304 U.S. 458 (1938) 6,7,12

Moore v. Michigan, 355 U.S. 155 (1957) 10,11,12

North Carolina v. Butler, 441 U.S. 369 (1979) 4,12

Sanders v. United States, 373 U.S. 1 (1963) 7,8

Constitution

United States Constitution, Amendment VI 7

Statutes

28 U.S.C. fol. §2254, Rule 9 4,5,6,7

M.C.L.A. 750.316, M.S.A. 28.548 12

M.C.L.A. 750.317, M.S.A. 28.549 12

M.C.L.A. 750.318, M.S.A. 28.550 11

No. 81-1667

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

CHARLES E. ANDERSON, Warden,
State Prison of Southern Michigan
at Jackson, Michigan,

Petitioner,

v

MICHAEL E. CONNER,

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OPINIONS BELOW

Copies of the Sixth Circuit Court of Appeals order, the District Court opinion and order, and the unreported orders of the Michigan Court of Appeals and the Michigan Supreme Court are attached to the Petition for Writ of Certiorari (Petitioner's Appendix, pp. 1a - 7a). In addition, copies of the orders of the District Court in the prior habeas proceedings are also attached to the petition (order of the District Court in docket no. 35079, August 31, 1970, Petitioner's Appendix 18a; order of the District Court in docket no. 36732, July 28, 1971, Petitioner's Appendix 21a). Also attached to the petition is the state judge's statement following the 1962 guilty plea (Petitioner's Appendix 33a).

JURISDICTION

Respondent accepts Petitioner's statement of Jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts Petitioner's statement of Constitutional and Statutory Provisons Involved.

COUNTERSTATEMENT OF THE CASE

Respondent, Michael E. Conner, was convicted upon a plea of guilty of the crime of first-degree murder. He was sentenced to serve life imprisonment at hard labor, without the possibility of parole, by the Circuit Court of Jackson County, Michigan, on December 13, 1962.

On that same day, Respondent was first arraigned on an open charge of murder. Under Michigan law if he plead guilty to open murder, Mr. Conner would then be subjected to a hearing to determine whether the killing was in the first or the second degree. Mr. Conner was 25 years-old at that time with less than a fourth grade education. He appeared in court without an attorney. In a mere 40 minutes, Mr. Conner was arraigned, plead guilty, was subjected to a degree hearing, and was sentenced to life imprisonment, all without the benefit of counsel.

Prior to this time, Mr. Conner had been in court on criminal charges only once before. In 1957, again without the assistance of an attorney, he was found guilty of breaking and entering. In addition, prior to the 1962 open murder plea, Respondent had received two brain concussions and suffered numerous blackouts. While awaiting trial on the murder charge, he was in fact receiving medical attention.

After the guilty plea to open murder, it was the degree hearing that led to a finding of first degree murder. The state called witnesses to testify in open court, but Mr. Conner asked no questions on cross-examination, nor presented any evidence in his behalf during the hearing.

During the time from his arrest, through police interrogation, the guilty plea, degree hearing and sentencing, the only advice Mr. Conner received was from the authorities. The police continually assured him not to worry and told him that if he was cooperative everything would be "okay." He was told he would receive a job with the police teaching boxing upon release from prison. He was never asked by judge, prosecutor or police if he specifically wished an attorney, and he never indicated to the authorities or the court that he did not want an attorney.

Most of these facts and circumstances surrounding Respondent's ability to knowingly and voluntarily waive his right to counsel were not on the record when the Sixth Circuit made its decision. They were contained in an affidavit of Respondent attached to his original petition in District Court, but were never explored by that court at an evidentiary hearing.

At the 1962 state court arraignment, the following colloquy took place between the trial judge and Mr. Conner:

THE COURT: Q: You understand, Mr. Conner, that you are entitled to an attorney of your own choice and if you are unable to furnish one that the State will furnish you one?

DEFENDANT: A: Yes.

Q: You understand that?

A: Yes.

Q: And also that you are entitled to a jury trial if you desire?

A: Yes.

Q: You understand that?

A: Yes.

Q: And you have heard the information read to you?

A: Yes.

Q: What do you wish to do?

A: (There is no response by the defendant, Mr. Conner.)

Q: (Continuing) How do you wish to plead if you want to plead?

A: Guilty.

Petitioner's Appendix 28a-29a.

No other questions were asked Mr. Conner regarding his right to counsel, nor was the question above repeated before the commencement of the degree hearing. After that hearing, the court pronounced Respondent guilty of first degree murder and imposed the mandatory sentence of life imprisonment.

On March 11, 1966, Respondent filed a writ of habeas corpus in the Michigan Court of Appeals, and on June 7, 1966, that court issued its order treating the petition as an application for delayed appeal, and denied it (see Appendix D attached to the Petition for Writ of Certiorari, Docket no. 81-6191). On May 22, 1970, Respondent's delayed application for leave to appeal was denied by the Michigan Supreme Court (see Appendix C attached to the Petition for Writ of Certiorari, Docket no. 81-6191).

On June 22, 1970, Respondent filed a Petition for Writ of Habeas Corpus with the United States District Court, Eastern District of Michigan. Among other allegations, he claimed that he had been denied counsel. Judge Roth, without the benefit of an evidentiary hearing, decided the issue against Respondent and dismissed the petition on August 31, 1970 (see Petitioner's Appendix 18a-20a). Respondent filed a second petition with the

District Court, on July 28, 1971, and Judge Roth again denied it without a hearing (see Petitioner's Appendix 21a-22a).

In 1978, Mr. Conner filed the present petition. This was the very first time since his arrest in 1962 during which he was assisted by an attorney. The petition asserted not that Mr. Conner had been denied counsel by the Jackson County court, but that the court failed to obtain a voluntary and knowing waiver of counsel from him. After oral argument on the state's motion to dismiss, but without having held an evidentiary hearing into the facts surrounding the issue of Respondent's alleged waiver of counsel, the Magistrate's Report and Recommendation found that the trial judge neglected to take an appropriate waiver of counsel from Mr. Conner and recommended that the District Court grant him the opportunity to plead anew to the murder charge. The Magistrate specifically found that the then recent decision of this Court in North Carolina v. Butler, 441 U.S. 369 (1979), was not inconsistent with his conclusion. District Judge Patricia Boyle refused to accept the recommendation of the Magistrate, held no evidentiary hearing, and on October 13, 1979, denied the petition on two grounds.

First, she stated in her opinion that Respondent had in fact waived counsel in accordance with the standards enunciated in North Carolina v. Butler, supra, and alternatively, that the petition was a third successive attempt to seek relief upon the same ground and thus was barred by Rule 9(b), 28 U.S.C. fol. §2254. Of this second reason for denying the petition, the Judge failed to distinguish the issue of denial of counsel by the state from that of the alleged waiver of counsel by Mr. Conner (Petitioner's Appendix 16a-17a).

In its order of November 30, 1981, the Sixth Circuit found that in terms of the 1962 Jackson County degree hearing (as opposed to the guilty plea itself), the court failed to obtain a valid waiver of counsel from Mr. Conner(see Petitioner's Appendix 1a-15a). It was unnecessary for the Court of Appeals to reach the issue of the Rule 9(b) dismissal.

In his dissent, sitting on the Court of Appeals by designation, Judge Rice concluded that he was unable to understand how a determination of the intelligence and the voluntariness of the alleged waiver of counsel could be made without some inquiry into the circumstances surrounding the challenged act. He deemed the record to be an inadequate exposition of the facts involved, and would have, at the least, remanded the case to the District Court for an evidentiary hearing into the circumstances surrounding Respondent's alleged waiver of counsel at the guilty plea.

Judge Rice also discussed the Rule 9(b) issue, and found that the District Court had abused its discretion in dismissing the petition on that basis (see Petitioner's Appendix 7a-15a).

REASONS FOR DENYING THE WRIT

A. THE DISTRICT COURT ABUSED ITS DISCRETION BY DISMISSING THE PETITION UNDER THE PROVISIONS OF 28 U.S.C. fol. §2254, Rule 9(b), WHERE THE ISSUE OF WHETHER THE STATE TRIAL COURT OBTAINED AN INTELLIGENT AND UNDERSTANDING WAIVER OF THE RIGHT TO COUNSEL WAS NOT PREVIOUSLY DETERMINED BY THE DISTRICT COURT ON THE MERITS, WHERE THAT GROUND WAS NOT DELIBERATELY WITHHELD FROM PRIOR PETITIONS, AND WHERE THE PRESENT PETITION WAS NOT AN ABUSE OF THE WRIT.

The District Court denied the Petition for Writ of Habeas Corpus in part on the basis of 28 U.S.C. fol. §2254, Rule 9(b). Rule 9(b) provides that "[a] second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits." An examination of the record indicates that the issue previously presented to Judge Roth was whether the trial court had denied counsel to respondent. Petitioner's Appendix 20a. According to Judge Roth's opinion, rendered in the first habeas case on August 31, 1970, the allegation presented by Respondent's petition was merely that "the police told him not to get an attorney and that the Court denied him the right to an attorney." Petitioner's Appendix 18a. The judge concluded that the record did not show that Respondent had been denied counsel. Petitioner's Appendix 20a.

It is true, as Petitioner points out in its petition, that the original habeas corpus action filed in 1970 by Respondent did cite Johnson v. Zerbst, 304 U.S. 458 (1938) and some other cases regarding the waiver of counsel(see that petition, part of the Joint Appendix in the Court of Appeals, pp. 119a-131a). An examination of the 1970 petition, however, reveals that the

citation to Johnson v. Zerbst was only one of dozens of citations, and the allegation regarding the waiver issue was only one of scores of allegations. That petition, filed without the assistance of counsel, is a rambling, often incoherent, shotgun approach attacking the state court conviction. In addition, what is important for the purposes of the Rule 9(b) issue is what in fact was decided by Judge Roth. To reiterate, what Judge Roth decided regarding counsel was whether Respondent had been denied such assistance, not whether the court failed to obtain a valid waiver thereof.

The issue of waiver of counsel (the matter at issue herein) raises different questions than those which arise in connection with a refusal or denial of counsel. While both relate to the broad area of the Sixth Amendment right to counsel, each presents a different ground or "sufficient legal basis for granting the relief sought." Sanders v. United States, 373 U.S. 1, 16 (1963). For example, as Judge Rice pointed out in his dissent, it is entirely conceivable that counsel would be offered with the utmost deference to constitutional requirements, but be waived by a defendant who was incapable of acting intelligently because he was insane. In such a circumstance, the right to relief could in no sense be said to depend upon whether the petitioner had been refused or denied counsel, but would rather rest entirely upon whether his waiver had been intelligently made. Johnson v. Zerbst, supra, 304 U.S. at 464.

Thus, although waiver and denial involve the same general concept, i.e., the right to counsel guaranteed by the Sixth Amendment, they provide distinct bases of relief. The instant petition, therefore, raising the issue of waiver as opposed to denial of counsel, did not constitute a successive petition, particularly

in light of this Court's admonition in Sanders that "[s]hould doubts arise in particular cases as to whether two grounds are different or the same, they sould be resolved in favor of the applicant." 373 U.S. at 16.

Moreover, even assuming that Conner's pleading below represented a successive petition, dismissal is still discretionary, and the District Judge erred in failing to consider whether Conner had demonstrated that "the ends of justice would be served by permitting the redetermination of the [previously asserted] ground." Id. While the judge below may have concluded that Conner had not made such a showing, her decision does not indicate that attention was directed toward this inquiry, as is mandated by Sanders. In this context, among the factors which indicate that redetermination is appropriate are the fact that prior to the present habeas action, Conner, a person of less than fourth grade education, has never been represented by counsel at any trial or appellate proceeding, and the fact that an evidentiary hearing has never been held with respect to any claim raised by Conner, even though some of those claims involved factual issues, such as alleged police misrepresentations, which could not have been resolved by resort to the state court transcript. Because the habeas petition and affidavits filed below clearly raise those issues, the District Judge erred by failing to consider, and negate if necessary, Conner's showing that redetermination of the issues in his petition would serve the ends of justice.

B. THE TRIAL COURT FAILED TO OBTAIN A KNOWING AND INTELLIGENT WAIVER OF COUNSEL FROM RESPONDENT WHERE RESPONDENT STOOD CHARGED WITH OPEN MURDER UNDER MICHIGAN LAW, THEREFORE FACING A HEARING TO DETERMINE THE DEGREE OF THE CHARGE, AND THUS, THE POSSIBLE PENALTY, AND WHERE THE TRIAL COURT FAILED TO ASK RESPONDENT IF HE UNDERSTOOD THE FACT THAT A HEARING WOULD BE HELD TO DETERMINE THE DEGREE OF HIS GUILT AND IF HE UNDERSTOOD THE VALUE OF COUNSEL AT THE HEARING.

Respondent agrees with Petitioner that the guilty plea and subsequent "degree hearing" were part of a single proceeding. In fact, in a mere 40 minutes, and without the benefit of counsel, Respondent was arraigned, entered a plea of guilty to open murder, was subjected to the hearing to determine the degree of the killing, and was sentenced to life imprisonment without the possibility of parole. Petitioner, however, misreads the order of the Court of Appeals in arguing that the Court manufactured an unnecessary, impractical, and legally redundant requirement of multiple waivers of counsel, and in saying that the Court of Appeals artificially bifurcated the proceeding and characterized it as two separate hearings.

The order of the Court of Appeals in no way engrafts upon the Michigan statutory procedure any additional constitutional requirement of multiple waivers of counsel. Instead, the Court merely held that the one alleged waiver of counsel was constitutionally insufficient to show that Respondent knowingly and intelligently waived his right to counsel at the degree hearing, although the majority of that Court did find it a sufficient waiver with regard to the guilty plea. Under the Court of Appeals order, the one waiver of counsel could have sufficed, but only if the trial court had advised Respondent of the fact that a

hearing was going to be held and the value of counsel to him at the hearing. The trial court failed to so advise Respondent. Petitioner's Appendix 1a-6a.

In addition, Judge Rice, sitting on the Court of Appeals by designation, dissented from the order. Unlike the majority, Judge Rice, a District Court Judge who daily is confronted with the task of deciding habeas corpus petitions and the necessity for holding evidentiary hearings on them, was unable to conclude that the conduct of Respondent was such to show that he had knowingly waived counsel with respect to even the guilty plea. He found that, at the very least, there existed issues of fact concerning the intelligence of the alleged waiver of counsel by Respondent, and would have remanded the cause to the District Court for an evidentiary hearing into the facts and circumstances surrounding the alleged waiver. Petitioner's Appendix 7a-15a.

It is undisputed that in 1962 at the time of these proceedings, Respondent was entitled to the representation of counsel. Moore v. Michigan, 355 U.S. 155, 159 (1957). Although the trial court asked Mr. Conner one question about counsel--whether he understood that he was entitled to an attorney and that the state would furnish him one--the court never asked Respondent if he desired a lawyer, and it never offered him one. Petitioner's Appendix 25a-32a. More importantly, the trial court gave absolutely no explanation of the complexities of the open murder statute under which Respondent stood charged or the procedures of proof-taking that would follow from a plea of guilty. In addition, the court never explained the value counsel might be to Respondent at the degree hearing.

Under Michigan law then applicable, if one accused of murder

entered a plea of guilty, the court would hold a hearing to determine the degree. M.C.L.A. 750.318, M.S.A. 28.550. It is not surprising that Mr. Conner was in fact not represented by counsel, because under the charge of open murder, no attorney with even ordinary skill and competence in criminal law would ever recommend such a plea, since the mandatory punishment is life imprisonment without the possibility of parole, and because no more severe penalty exists in Michigan.

The peculiar complexity of the Michigan open murder statute was dealt with by this Court in Moore, supra. Unlike the present case, the trial court there specifically asked Moore whether he had an attorney and whether he desired one. Moore replied that he did not want to be represented by counsel. In finding that Moore had not made a knowing and intelligent waiver of his right to counsel, this Court noted that under the open murder charge, an attorney is particularly necessary because:

> ...the proceedings to determine the degree of murder, the outcome of which determined the extent of the punishment, introduced their own complexities. With the aid of counsel, the petitioner, who...neither testified himself in the proceeding nor cross-examined the prosecutor's witnesses, might have done much to establish a lesser degree of the substantive crime, or to establish facts and make arguments which would have mitigated the sentence. Moore, supra, 355 U.S. at 660.

In the present case the record indicates that the information did not allege either premeditation or armed robbery (Petitioner's Appendix 28a) and that it was not until after the degree hearing that the judge found murder in the first degree because a robbery was taking place. Petitioner's Appendix 33a. The record is barren of any comment concerning the usefulness of an attorney, or why an attorney would be of particular importance given the charge and the complexities of the hearing that would follow a plea of guilty. Pleading guilty to open murder is unlike the

normal guilty plea where the accused who pleads guilty thereafter only faces sentencing. Under open murder the accused, by pleading guilty, subjects himself to a judicial determination of the degree of the murder, a procedure characterized by this Court as a trial. Moore, supra. This is so because it is the degree hearing and not the guilty plea which ultimately determines the fate of the accused since first-degree murder carries a mandatory sentence of life imprisonment, while a finding of second-degree murder allows the court the discretion of sentencing the defendant to any term of years. Cf., M.C.L.A. 750.316, M.S.A. 28.548 and M.C.L.A. 750.317, M.S.A. 28.549.

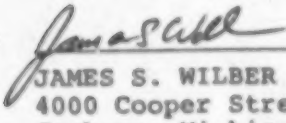
The plea here foisted upon Respondent the necessity of self-representation at the hearing to determine the degree of the charge, and thus, the punishment. During the crucial hearing, Respondent neither testified or introduced any mitigating evidence in his own behalf, nor did he ask any questions of the prosecution's witnesses on cross-examination. He was not made aware of the dangers and disadvantages of self-representation and the record does not establish that he knew what he was doing or that the choice was made with his eyes open. Faretta v. California, 422 U.S. 806 (1975). As the Court of Appeals found, the trial court failed to obtain a constitutionally sufficient waiver of counsel from Respondent with regard to the degree hearing, as required by Johnson v. Zerbst, supra, and North Carolina v. Butler, supra.

CONCLUSION

For the foregoing reasons, Respondent requests that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Prison Legal Services of Michigan, Inc.

Dated: March 11, 1982 By: 

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Attorney for Respondent

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MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

The Respondent, Michael E. Conner, asks leave to file the attached Brief in Opposition to the petition without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

Leave to proceed in forma pauperis was sought in the District Court below and was granted by said court.

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PROOF OF SERVICE

I, the undersigned, hereby certify under penalty of perjury that one copy of the Brief in Opposition and Motion to Proceed In Forma Pauperis have been served on opposing counsel, Frank J. Kelley, Attorney General, Thomas L. Casey, Assistant Attorney General, 525 West Ottawa Street, Lansing, Michigan 48913, by placing said documents in a properly addressed envelope with postage prepaid and placing said envelope in the United States mail box located at or in Lansing, Michigan, on this 11th day of March, 1982.

Dated: March 11, 1982

JAMES S. WILBER
Attorney for Respondent